86 - 1125

No. 86-

Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DAVID L. WILKINSON,
Attorney General of the State of Utah,
Appellant,

v.

CONNIE R. JONES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

---

JURISDICTIONAL STATEMENT

REX E. LEE *
Special Assistant
Attorney General
for the State of Utah
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
Telephone: (202) 429-4000

RALPH L. FINLAYSON
Assistant Attorney General
for the State of Utah
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-5261

RICHARD G. WILKINS
Special Assistant
Attorney General
for the State of Utah
1042 East 850 North
Orem, Utah 84057
Telephone: (801) 225-9085
Counsel for Appellant

* Counsel of Record

CHARLES A. HOBBS
THEODORE A. SHIELDS
Special Assistant
Attorneys General
for the State of Utah
HOBBS, STRAUS,
DEAN & WILDER
1819 H Street, N.W.
Washington, D.C. 20006
(202) 783-5100

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

40pp

QUESTIONS PRESENTED *

1. "[W]hether the First Amendment denies government any power to restrict the public [dissemination] of indecent [material on cable television] in any circumstances." *FCC v. Pacifica Foundation*, 438 U.S. 726, 744 (1978) (opinion of Stevens, J.)

2. Whether the lower courts erred in striking down on its face a state cable television indecency statute notwithstanding the fact that the legislation, which "rest[s] entirely on a nuisance rationale under which context is all-important" (*Pacifica*, 438 U.S. at 750), has never been enforced in a concrete factual situation.

3. Whether the attorneys' fees provision of 42 U.S.C. § 1988, which was drafted to eliminate some of the financial hurdles preventing persons with "little or no money" from enforcing their civil rights (S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976)), authorizes large fee awards to wealthy corporate litigants who would have pressed their claims absent the statute.

---

* In addition to the parties set forth in the caption, the following are parties to this action:

1. *Plaintiffs:* Lynn F. Jones; Caroline A. Snow; Ralph McCleary; Kay Ulrich; Ed Ulrich; Wayne Williams; Community Television of Utah, Inc.; Community Cable of Utah, Inc.; Utah Satellite, Inc.; Wasatch Community T.V., Inc.; the non-corporate plaintiffs were named representatives of a class of similarly situated cable television subscribers.

2. *Plaintiff in Intervention:* Home Box Office, Inc.

3. *Defendant:* In addition to being named in his official capacity, David L. Wilkinson was named, by order of the district court, as a representative of a class of all persons empowered to enforce the Utah Cable Television Programming Decency Act.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTION AND STATUTES	2
STATEMENT OF THE CASE	2
1. The Utah Cable Television Programming Decency Act	3
2. Proceedings Below	9
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	12
I. The State Of Utah Constitutionally May Channel Programming Which Is Presented In A "Patently Offensive Way For The Time, Place, Manner And Context In Which The Material Is Presented" To A Different Time, Place, Manner Or Context	14
A. The Rationale Of *Pacifica* Is Applicable To The Utah Act	17
B. The Act Is Not Unconstitutionally Vague	21
II. The Lower Courts Erred In Striking Down The Act On Its Face Notwithstanding That It Rests Upon A Nuisance Rationale Under Which Context Is All-Important And Has Never Been Enforced In A Concrete Factual Situation	23
III. 42 U.S.C. § 1988 Does Not Authorize The Award Of Attorneys' Fees To Wealthy Corporate Litigants Who, Absent The Fee Provision, Would Nevertheless Have Pressed Their Claims	27
CONCLUSION	30

TABLE OF APPENDICES
(See separate volume)

	Page
A. Opinion of Court of Appeals, Sep. 8, 1986	1a
Concurring opinion by Judge Baldock	8a
B. Opinion of District Court, Apr. 10, 1985	41a
C. Order of District Court Granting Attorney Fees and Final Judgment, June 28, 1985	80a
D. Final Judgment of Court of Appeals, Sep. 8, 1986	86a
E. Notice of Appeal, Nov. 21, 1986	90a
F. Utah Cable Television Programming Decency Act, enacted Apr. 20, 1983	94a
G. Cable Television Intent Statement	99a
H. Formal Opinion 83-001, Utah Attorney General, Oct. 17, 1983	101a
I. Cable Communications Policy Act, enacted Oct. 30, 1984, Section 638; 47 U.S.C. § 558 (1986 Supp.)	128a

TABLE OF AUTHORITIES

CASES Page

Addington v. Texas, 441 U.S. 418 (1979) 2
Alabama State Federation of Labor v. McAdory, 325 U.S. 4540 (1945) 25
Bethel School District No. 403 v. Fraser, 106 S.Ct. 3159 (1986) 13, 19
Board of Education v. Pico, 457 U.S. 853 (1982) .. 13, 19
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 19
Boyce Motor Lines v. United States, 342 U.S. 337 (1952) 22
Broadrick v. Oklahoma, 413 U.S. 600 (1973) 25, 26
Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985) 13, 22, 25-26
Christensen v. Industrial Commission, 642 P.2d 755 (Utah 1982) 20
City of Renton v. Playtime Theatres, 106 S.Ct. 925 (1986) 19
Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985) 15, 28
Erznoznik v. Jacksonville, 422 U.S. 205 (1975) 15
FCC v. Pacifica Foundation, 438 U.S. 726 (1978) ..*passim*
Ginsberg v. New York, 390 U.S. 629 (1968) .....*passim*
Grayned v. City of Rockford, 408 U.S. 104 (1972) .. 24
Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 24
Home Box Office Inc. v. Wilkinson, 531 F.Supp. 987 (D. Utah 1982) 4, 15, 28
International Longshoremen's and Warehousemen's Union Local 37 v. Boyd, 347 U.S. 222 (1954) 24-25
Jacobellis v. Ohio, 378 U.S. 184 (1964) 15
Kleppe v. New Mexico, 426 U.S. 529 (1976) 25
Miller v. California, 413 U.S. 15 (1973) .....*passim*
Millett v. Clark Clinic Corp., 609 P.2d 934 (Utah 1980) 20
Muskrat v. United States, 219 U.S. 346 (1910) 25
New York v. Ferber, 458 U.S. 747 (1982) .....*passim*
Prince v. Massachusetts, 321 U.S. 158 (1944) 21
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 23

TABLE OF AUTHORITIES—Continued

Page

Rowan v. Post Office Dept., 397 U.S. 728 (1970) 15, 21
United States v. Sullivan, 332 U.S. 689 (1948) 23
Watson v. Buck, 313 U.S. 387 (1941) 26
Wheatley v. Ford, 679 F.2d 1037 (2d Cir. 1982) 27, 29
Young v. American Mini-Theatres, 427 U.S. 50 (1976) 19
Younger v. Harris, 401 U.S. 50 (1971) 25-26
Zarcone v. Perry, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) 28-29

STATUTES

Cable Television Programming Decency Act, Utah Code Ann. § 76-10-1701 through 1708 (Supp. 1986) (App. F) ..... *passim*
Cable Communications Policy Act, Pub.L. 98-549, (1984), 47 U.S.C. §§ 521-529, 558 (Supp. 1985) (App. I) 9-10, 13
18 U.S.C. § 1464 18
28 U.S.C. § 1254 2
28 U.S.C. § 1254(2) 2, 12
28 U.S.C. § 2103 2
42 U.S.C. § 1988 ..... 2, 12, 27-30

LEGISLATIVE HISTORY

S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976) 27
H.R. Rep. No. 934, 98th Cong., 2d Sess. 95 (1984) .. 10, 13
H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1, 3, 4 (1976) 27-28
121 Cong. Rec. 26806 (1975) 27
122 Cong. Rec. 31471, 35118, 35126, 35127, 35128 (1976) 28
130 Cong. Rec. S14289 (Daily Ed. October 11, 1984) 10, 13

MISCELLANEOUS

Bill Drafting Manual for the State of Utah, 15 (Utah 1985) 20-21
L. Tribe, Constitutional Law § 12-24 at 710 (1978) 25

TABLE OF AUTHORITIES—Continued

Page

J. Madison, The Federalist, No. 37 at 229 (New American Library 1961) 22
Riggs, Indecency on the Cable: Can It Be Regulated?, 26 Ariz. L. Rev. 269 (1984) 2, 12, 15
Wright, Miller & Cooper, Federal Practice and Procedure, § 4037 (1978) 12
Formal Opinion No. 83-001 October 17, 1983, Utah Attorney General (App. H) 6-8
Recent bills in several states respecting indecency on cable television 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-

DAVID L. WILKINSON,
Attorney General of the State of Utah,
Appellant,

v.

CONNIE R. JONES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

---

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit (App. A), dated September 8, 1986, is reported at 800 F.2d 989. The district court's memorandum decision (App. B) is reported at 611 F. Supp. 1099. The district court's order (App. C) granting plaintiffs' motion for an award of attorneys' fees, dated June 28, 1985, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1986 (App. D). The notice of appeal (App. E) was filed with the clerk of the United States Court of Appeals for the Tenth Circuit on November 21, 1986. An extension of time to and including January 6, 1987, in which to docket this appeal was granted by Associate

Justice Byron R. White on November 25, 1986. The Court has jurisdiction of this appeal under 28 U.S.C. § 1254(2).[1]

CONSTITUTION AND STATUTES

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

The entire text of the Cable Television Programming Decency Act, Utah Code Ann. § 76-10-1701 through 1708 (Supp. 1986), is set out in App. F.

STATEMENT OF THE CASE

Cable television has become a pervasive presence in modern American homes.[2] The development and expan-

---

[1] The first two questions presented by appellant, which deal with the propriety of a federal court's invalidation of an important state statute on First Amendment grounds, are plainly within the appellate jurisdiction conferred by 28 U.S.C. § 1254(2). The jurisdictional basis for the third question is somewhat more ambiguous. Although the Court's appellate jurisdiction under 28 U.S.C. § 1254 extends to "[*c*]*ases* in the courts of appeals" (*ibid.*, emphasis added), not just discrete "issues" in those "cases," it is not altogether clear that the question involving the propriety of attorneys' fee awards under 42 U.S.C. § 1988 falls within the purview of § 1254. Should the Court conclude that this question is not within its appellate jurisdiction, appellant requests that the Court treat this jurisdictional statement as a petition for a writ of certiorari on that question and grant certiorari on the issue. *See* 28 U.S.C. § 2103 (appeal papers may be "regarded and acted on as a petition for a writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken"). *See also Addington v. Texas*, 441 U.S. 418, 422-423 (1979) ("construing the [appeal] papers filed as a petition for a writ of certiorari, we now grant the petition").

[2] *See, e.g.*, App. A at 34a (Baldock, J., concurring); Riggs, *Indecency on the Cable: Can It Be Regulated?*, 26 Ariz. L. Rev. 269, 269 & n.1, 311-319 (1984) (hereafter cited as "Riggs").

sion of the medium has resulted in significant public benefits, such as diversity and increased program choice. Along with its benefits, however, cablecasting [3] also has "the capacity * * * to invade the privacy of the home with uninvited, unexpected, and unwanted program material of a patently offensive nature." [4] This case raises important questions regarding the ability of a state constitutionally to regulate indecent program material by channeling its presentation so as to minimize its impact on unwilling adult and susceptible child viewers.

1. The Utah Cable Television Programming Decency Act

The 1983 Cable Television Programming Decency Act (the "Act") represents the second effort by the State of Utah to accommodate the First Amendment rights of cable television operators and their subscribers with both the privacy interests of adult viewers who do not wish to be assaulted by patently offensive material and the interests of the State in the " 'well-being of its youth.' " *FCC v. Pacifica Foundation*, 438 U.S. 726 at 749 (1978) (quoting *Ginsberg v. New York*, 390 U.S. 629, 640 (1968)). The earlier statute, enacted in 1981, made it a misdemeanor to "knowingly distribute by wire or cable any pornographic or indecent material." [5] That statute completely prohibited the depiction of "illicit sex or sexual immorality," [6] which was broadly defined "to include most depictions of nudity, sexual activity, and

---

[3] "Cablecasting" is here used to distinguish the transmission of the final stage of television signals through a coaxial or other cable from transmission entirely through the atmosphere, as occurs with traditional "broadcasting."

[4] Riggs, *supra*, at 312.

[5] Utah Code Ann. § 76-10-1229 (Supp. 1986). *See also* Riggs *supra*, 26 Ariz. L. Rev. at 294 (describing the 1981 act as "poorly drafted").

[6] Utah Code Ann. § 76-10-1227 (Supp. 1986).

other * * * erotic acts."[7] The United States District Court for the District of Utah declared that this outright ban on the presentation of sweepingly defined non-obscene material was constitutionally overbroad.[8] The Utah Attorney General did not appeal from that judgment.

In 1983, the Utah legislature enacted a second cable decency statute, this time paying close heed to the decisions of this Court. In its official statement of intent accompanying the Cable Television Programming Decency Act, the legislature declared that the Act was intended "to protect, in a broad sense, the rights of free speech guaranteed by the First Amendment * * * as interpreted by the United States Supreme Court." App. G at 99a. The legislature noted that, in assessing the constitutionality of attempts to regulate the media, this Court has "considered such factors as the pervasive presence [of the regulated medium] in the community, the extent to which it invades the privacy of the home, and the accessibility of the medium to children." *Ibid. Cf. Pacifica*, 438 U.S. at 748-750. The legislature, "after a careful evaluation of the cable television medium," concluded that indecent cable television programming may be regulated legitimately to some extent because (App. G at 99a):

> (1) children have access to cable television and, in many cases, are unsupervised by parents; (2) cable television receivers are in the home, a place where the individual's privacy interest is afforded and entitled to extra deference; (3) unconsenting adults may, without warning, tune into a cable television program where offensive language or depictions are being transmitted; and (4) because, as a practical matter, there is a limit to the number of cable television stations that a community will be able to franchise.

These considerations, which closely track the policies supporting FCC regulation of indecent broadcast materials

---

[7] Riggs, *supra*, 26 Ariz. L. Rev. at 294.

[8] *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

(*Pacifica*, 438 U.S. at 731 and n. 2), persuaded the legislature to undertake the "delicate task of balancing these concerns with the First Amendment rights of cablecasters." App. G at 100a.

The delicate balance struck in the 1983 Act differs significantly from the approach of Utah's first cable television statute. First, there are no criminal penalties attached to the Act. Instead, the Act provides for a maximum fine of $1,000 plus costs and attorneys' fees for a first offense.[9] Second, the Act does not prohibit the cablecasting of objectionable materials. Rather, it merely entitles the Utah Attorney General or any county or city attorney to bring a civil nuisance action against any person who, "as a continuing course of conduct, * * * knowingly distributes indecent material within this state over any cable television system or pay-for-viewing television programming." Utah Code Ann. § 76-10-1703 (Supp. 1986).

Finally, unlike the earlier cable statute, the Act carefully limits "indecent material" to a display of a specifically described sexual activity (including a sexual or excretory organ or function, sexual intercourse or masturbation)[10] which "the average person applying con-

---

[9] Utah Code Ann. § 76-10-1704 (Supp. 1986). The maximum civil penalty for a repeat offender is "$10,000, plus costs and reasonable attorney's fees." § 76-10-1704(4).

[10] The sexual activities or states covered by the Act include (Utah Code Ann. § 76-10-1702(4) (Supp. 1986):

> (a) A human sexual or excretory organ or function; or
>
> (b) A state of undress so as to expose the human male or female genitals, pubic area, or buttocks, with less than a fully opaque covering, or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; or
>
> (c) An ultimate sexual act, normal or perverted, actual or simulated; or
>
> (d) Masturbation

temporary community standards for cable television or pay-for-viewing television programming would find is presented in a patently offensive way for the time, place, manner and context in which the material is presented."[11] Thus, under the Act, a cablecast is not actionable unless the material is presented "in a patently offensive way," as judged by contemporary community standards for cable television, with full consideration of its "time, place, manner and context." Utah Code Ann. § 1702(4) (Supp. 1986). This essential flexibility follows this Court's recognition that, for media regulation resting on a nuisance rationale, "context is all-important. The concept requires consideration of a host of variables." *Pacifica*, 438 U.S. at 750.

Following passage of the Act, the appellant, the Attorney General for the State of Utah, received a request from the county attorney for Davis County, Utah, to issue a formal opinion interpreting the statute.[12] In response, the appellant issued Formal Opinion No. 83-001 (App. H) on October 17, 1983. Relying on the plain wording of the Act, the legislative intent statement, and transcripts from the legislative debates surrounding its enactment, the Opinion interpreted the Act as complying with this Court's rulings which permit restrictions, in specified circumstances, upon the distribution of indecent, but not obscene, material.[13]

The Opinion stressed that the Act does not prohibit the distribution of indecent material at all times. "That the drafters of the Act intended it to be a * * * *regulatory* act, and not a *prohibitory* act, is abundantly clear from

---

[11] Utah Code Ann. § 76-10-1702(4) (Supp. 1986).

[12] The State Attorney General is obligated to issue opinions regarding the interpretation and enforcement of State laws upon the written request of a county attorney. Utah Code Ann. § 67-5-1(6) (1986). *See also* cases cited at note 42, *infra*.

[13] *See, e.g., Pacifica, supra,* and cases cited at note 35 *infra*.

the language they employed" in the definition of "indecent material." App. H at 105a (emphasis in original). Under that definition, cablecast material is "indecent" only if found to be "patently offensive" under contemporary community standards for the "time, place, manner and context in which the material is presented." Utah Code Ann. § 76-10-1702(4) (Supp. 1986). Accordingly, the Opinion concluded that the Act does not ban the cablecast of indecent materials, but rather channels their distribution to late evening hours when the State's interests in protecting the privacy of unwilling adult viewers and minor children are reduced. App. H at 107a, 110a-112a. The Opinion quoted extensive excerpts from the legislative debates surrounding the adoption of the Act in support of the conclusion that the statute serves a channeling, rather than prohibitory, function.[14]

---

[14] Those excerpts included the statement of Sen. Paul Rogers, the chief sponsor of the Act, who described the legislation as a "permissive bill" (App. H at 107a-108a):

> It is not a ban, it is not a prohibition. It does however set up minimum criteria which when implemented will tend to have a restrictive influence over indecent material which * * * [would otherwise] be widely distributed and cablecast during all different times of the day * * *. [Y]ou may have masturbation or intercourse taking place over your cable television screen, that at least it may be at a time when fewer younger members of our population for example may be present * * *.

Other legislators made similar statements explicating the channeling function of the Act. *See, e.g.*, statement of Rep. James Moss (House sponsor of the Act) (App. H at 108a) ("[The bill] is not in fact a prohibition on broadcast [sic] of all sexual activity over cable television * * *. Now prior attempts in this area have required a blanket prohibition on certain forms of speech that go beyond the standard of pornography * * *. The bill that you have before you is a much more moderate bill than that and would not preclude even the kind of things that were broadcast in the *Pacifica* case. * * * There can obviously then be times during the course of a day or night when given the time, place, manner and context

Consistent with the legislative intent to channel rather than prohibit cablecast indecency, the Opinion set out specific guidelines for enforcement of the Act by the State. Noting that a "key legislative finding, expressed in the Intent Statement, is that 'children have access to cable television and, in many cases, are unsupervised by parents,' " a concept that "lies at the heart of the United States Supreme Court's opinion in *FCC v. Pacifica Foundation*," the Opinion concluded that the Act would not be applicable to cablecasting " 'during late evening hours when fewer children are likely to be in the audience.' " App. H at 110a (quoting *Pacifica*, 438 U.S. at 760 (Powell, J., concurring)). The Opinion established the period between midnight and 7 a.m. as hours during which no enforcement actions would be taken. *Id.* at 112a-113a.[15]

---

of broadcast [sic], material would not be found to be indecent. * * * Now that is not a blanket prohibition"). *See also* statement of Sen. Karl Swan (App. H at 108a) ("If it [the Act] has the effect of restricting the times that some of the other [indecent] things are shown * * * I think the public will be well served * * * and the First Amendment will still be very viable").

Excerpts from the legislative debates surrounding the Act were presented to the district court in Def. Exh. 3, Rec. Vol. X. The above excerpts were quoted in Formal Opinion 83-001 (App. H).

[15] The Opinion recognized that the definition of "late evening hours" was a " 'relatively new and difficult area of the law.' " App. H at 112a (quoting *Pacifica*, 438 U.S. at 756 (Powell, J., concurring)). In reliance on Justice Powell's observation in *Pacifica* that "both adults and unsupervised children are likely to be in the broadcast audience" during "most of the broadcast hours" (438 U.S. at 758), the Opinion reasoned that regulatory limitations were permissible during early evening hours. Accordingly, the Opinion concluded that the period between midnight and 7 a.m. was the time when there were "the fewest children unsupervised." App. H at 113a. The Opinion also found that this period met "the First Amendment need to have more than just a nominal time span duration during which indecency may be lawfully shown." *Ibid.*

2. Proceedings Below

The day following passage of the Act,[16] Community Television of Utah and three other cable television operators filed suit against the Attorney General individually, in his offiical capacity, and as the representative of all persons empowered to enforce the statute. *Community Television of Utah, et al. v. David L. Wilkinson, et al.*, Civil No. C-83-0551-A, (D. Utah). A few days later, a separate action was filed by several individual cable television subscribers. *Connie R. Jones, et al. v. David L. Wilkinson, et al.*, Civil No. C-83-0581-A, (D. Utah). The two cases were consolidated, and somewhat later Home Box Office, Inc., was allowed to intervene as an additional plaintiff.

All plaintiffs claimed, *inter alia*, that the Act was unconstitutional under the First Amendment because it regulated material that was not legally obscene. Plaintiffs further asserted that, because the State lacked any constitutional power to regulate non-obscene material, they could present their attack facially, in advance of any enforcement action or the threat of any such action. Appellant agreed not to enforce the Act until the court ruled on the plaintiffs' motion for summary judgment. The plaintiffs thereafter amended their complaints to allege that the Act was preempted by the Cable Communications Policy Act, Pub. L. 98-549, 47 U.S.C. §§ 521-559 (Supp. 1985), adopted by Congress in 1984 (App. I).

In the district court, appellant submitted videotaped excerpts from several movies which had been cablecast in Utah containing explicit sexual activity, sometimes mixed with violence, which most people would consider grossly improper for young children to view. The excerpts were submitted as representative examples of materials that

---

[16] The Cable Television Programming Decency Act was passed into law on April 20, 1983. This litigation was filed at 8 a.m. the following morning. *Community Television of Utah, et al. v. David L. Wilkinson, et al.*, Civil No. C-83-0551-A (D. Utah April 21, 1983).

would prompt enforcement proceedings under the Act if cablecast as a continuing course of conduct between the hours of 7 a.m. and midnight. *See* App. H at 113a. The district court refused to consider the taped excerpts.[17]

On April 10, 1985, the district court ruled for plaintiffs on the merits. Addressing first the plaintiffs' contention that the Act was preempted by the new Cable Communications Policy Act, the district court concluded that § 638 of that Act, 47 U.S.C. § 558 (App. I at 128a), preserved the ability of the states to apply "obscenity * * * or other similar laws" (*ibid.*) to cablecasters so long as the regulated program content was not protected by the First Amendment. App. B at 53a-54a.[18] Because the Utah Act is "similar" to obscenity regulations, the district court found that the "final resolution of the preemption question necessarily requires a ruling on the first amendment issue." App. B at 54a.

---

[17] Appellant also submitted the affidavits of four witnesses who averred that approximately five to ten percent of the cable movies transmitted by the plaintiffs were, in their opinions, patently offensive because of strong, explicit sexual content. Def. Exhs. 9 through 12, Rec. Vol. X. The affiants stated that they subscribed to cable television to receive "first-run neighborhood theater" type movies that "the whole family can enjoy" (descriptions used in cable advertising, see Def. Exhs. 14-17), including movies rated "R" by the Motion Picture Association, but not the patently offensive material just described. The affiants further stated that the patently offensive materials were often shown at times when their children were watching television. As with the taped excerpts, the district court disregarded the affidavits.

[18] *See* H.R. Rep. No. 934, 98th Cong., 2d Sess. 95 (1984) (47 U.S.C.. § 558 preserves state power to regulate "speech which may be held by the courts to be unentitled to constitutional protection"); *id.* at 69 (the Cable Communications Policy Act preserves the right of the states to regulate "not only obscene speech, but other speech which may also be unprotected by the Constitution" should "judicial interpretations at some point in the future deem additional standards, such as indecency, constitutionally valid as applied to cable"). *See also* 130 Cong. Rec. S14289 (daily ed. Oct. 11, 1984) (colloquy between Senators Goldwater and Trible).

Reaching the merits of the First Amendment claims, the court held the Act overbroad and invalid on its face because it "regulates 'indecent' material and does not limit itself to material that is legally obscene." App. B at 59a. The district court concluded that the State lacked authority to regulate non-obscene speech on cable television, and faulted the Act for failing to incorporate the first and third prongs of the three-part obscenity test of *Miller v. California*, 413 U.S. 15, 24 (1973).[19]

The district court rejected the argument that the State's interests in the welfare of its youth and the privacy rights of unwilling adult viewers gave the State any constitutional authority to channel cablecast indecency to late evening hours. The court concluded that *Pacifica*, which upheld the authority of the federal government to regulate broadcast indecency on such grounds, did not save the Act because the decision is subject to "narrow" factual limitations, has been limited by subsequent authority, and is inapplicable outside the realm of broadcast regulation. App. B at 61a-74a.

Finally, the district court held that the Act was "void for vagueness" because "the limiting principles contained in *Miller* are not present." App. B at 77a. The court concluded that the "time, place, manner and context" requirements of the Act are invalid because they provide "neither fair notice or warning nor reasonably clear guidelines." App. B at 78a.

By its order and final judgment dated June 28, 1985, the district court permanently enjoined the enforcement of the Act. It also granted the plaintiffs' motion for at-

---

[19] Somewhat inexplicably, the district court also held that the Act failed to meet the second *Miller* prong, which requires that regulated material "depict or describe sexual conduct in a patently offensive way." Ap. B at 60a. *Cf.* App. A at 17a-18a (Baldock, J., concurring) (I cannot agree [with the district court] that [the Act] fails to satisfy the 'patently offensive sexual conduct' element of the *Miller* test").

torneys' fees under 42 U.S.C. § 1988, rejecting the State's assertion that the fee statute was inapplicable to the wealthy corporate plaintiffs before the court.

The court of appeals in a brief per curiam opinion affirmed the decision of the lower court "on the basis of the reasons stated in the [district court] opinion." App. A at 5a. Judge Baldock issued a lengthy concurring opinion in which he concluded that a State does have the constitutional authority to channel indecent material to late-night viewing hours. App. A at 34a-38a. (Baldock, J., concurring). He nevertheless considered the Act unacceptably vague, and concluded that it constituted "complete prohibition rather than regulation" of indecent material and was accordingly unconstitutionally overbroad. App. A at 39a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL[20]

The people of the State of Utah, through their elected representatives, have twice attempted to alleviate the assault of cablecast indecency upon unwilling adult viewers and to limit its widespread availability to impressionable children. Although the first legislative effort may well have been constitutionally infirm,[21] the Cable Television Programming Decency Act carefully follows precedent of this Court which permits limited restrictions on

---

[20] As set out in this section, the federal questions presented here are plainly substantial. Accordingly, this Court need not reach the issue whether 28 U.S.C. § 1254(2) requires review regardless of "substantiality." *See* Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4037 at 39 (1978) ("The historic analogy to appeals from state courts that gave birth to § 1254(2) * * * suggest[s] that appeal jurisdiction might be defeated by lack of a substantial question. This possible limitation should be rejected. * * * Appeal lies from a court of appeals * * * only if it has held a state statute invalid. There may be some state statutes that are so transparently invalid that the Supreme Court need not bother with full presentation of arguments. Such cases are apt to be rare").

[21] *See* Riggs, *supra*, 26 Ariz. L. Rev. at 270.

the distribution of indecent matter in the furtherance of substantial State interests. *See New York v. Ferber*, 458 U.S. 747 (1982); *Board of Education v. Pico*, 457 U.S. 853 (1982); *Pacifica, supra; Ginsberg v. New York, supra. See also Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159 (1986); *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. 2794 (1985). The lower courts' refusal to recognize that precedent and cede the Act any constitutional scope mandates intervention by this Court.

The questions presented are important not only to the State of Utah, but also to the Nation. In express recognition of the pressing social issues raised by the electronic dissemination of indecent matter, section 638 of the Federal Cable Communications Policy Act of 1984, 47 U.S.C. § 558 (App. I at 128a), preserves the right of the states to regulate "not only obscene speech, but other speech which may also be unprotected by the Constitution." H.R. Rep. No. 934, 98th Cong., 2d Sess. 95 (1984); *see* also 130 Cong. Rec. S14289 (Daily Ed. Oct. 11, 1984). Congress has plainly indicated its intent not to stymie state regulation of indecent material so long as state efforts are "constitutionally valid as applied to cable." H.R. Rep. No. 934 at 69. Thus, Congress recognized the importance of the questions raised here, and the reach of Congress' statute (as well as the FCC's regulatory authority thereunder) depends on the resolution of those questions. During the past several years, numerous states have considered proposals to regulate cablecasting of indecent, but not obscene, speech.[22] This case gives the

---

[22] Among those states which have considered such proposals are California (S.B. No. 1700, 1981-82 Reg. Sess. (1982)), Florida (H.B. No. 26, 87th Reg. Sess. (1985)), Kentucky (H.B. No. 644 and S.B. No. 123, Reg. Sess. (1984)), Louisiana (S.B. No. 192, 80th Reg. Sess. (1982)), Massachusetts (H.B. No. 5726, 174th Bien. (1985)), Missouri (H.B. No. 558, 82d Gen. Assem., 1st Reg. Sess. (1983)), North Dakota (S.B. No. 2401, 48th Leg. Assem., Reg. Sess. (1983)), and Pennsylvania (S.B. No. 645, 169th Reg. Sess. (1985)).

Court the opportunity to clarify the extent to which such regulation is permissible.

That such clarification is needed is demonstrated dramatically by the present case. The lower courts refused to legitimize any assertion of regulatory authority over indecent—but non-obscene—cablecast material, notwithstanding its pervasive presence in the home and ready accessibility to minor children. Furthermore, despite the fact that the Act regulates only those cablecasts which constitute a "nuisance," and expressly ties enforcement to a careful consideration of "time, place, manner and context," [23] the courts below sustained a facial attack upon the statute well in advance of any concrete application of the legislation. Finally, the courts below reflexively awarded attorneys' fees to wealthy corporate litigants, even though they are clearly not within the class of persons for whose benefit the fee statute, 42 U.S.C. § 1988, was enacted. Each of these issues merits plenary consideration.

I. The State Of Utah Constitutionally May Channel Programming Which Is Presented In A "Patently Offensive Way For The Time, Place, Manner And Context In Which The Material Is Presented" To A Different Time, Place, Manner Or Context

The district court and court of appeals concluded that the Act was unconstitutionally overbroad because "it does not limit itself to material that is legally obscene." App. B at 59a; App. A at 5a. The lower courts have therefore necessarily held that the State has *no* constitutional authority to regulate *any* patently offensive material other than that which is obscene.[24] That holding is con-

---

[23] Utah Code Ann. § 76-10-1702, -1703 (Supp. 1986).

[24] This, of course, contradicts this Court's answer in *Pacifica* to the question "whether the First Amendment denies government any power to restrict the public [dissemination] of indecent [material] in any circumstances." *Pacifica*, 438 U.S. at 744 (opinion of Stevens, J.).

sistent with the decision striking down the first Utah cable statute [25] and with a more recent opinion from the 11th Circuit invalidating a Florida cable decency statute.[26] But an unexamined, blanket prohibition of government regulation of indecent, but non-obscene, material "surely is an oversimplified analysis of a very complex legal issue. Past precedent does not dictate such a severe limitation upon government regulation of any other medium of communication, including the print media, and no court has attempted to provide a rationale for placing cable in a first amendment position superior to all the rest." [27]

This Court has recognized that there are substantial governmental interests in regulating communications that "come[] directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds," and in adopting " 'more stringent controls on communicative materials available to youths than on those available to adults." *Pacifica*, 438 U.S. at 759, 757 (Powell, J., concurring) (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975)).[28] These interests form the core for this Court's conclusion in *Pacifica* that the FCC had the authority to prohibit the mid-afternoon broadcast of indecent—but not obscene—material. 438 U.S. at 748-750. Quite simply, when government "finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." *Id.* at 750-751.

---

[25] *Home Box Office, Inc. v. Wilkinson, supra.*

[26] *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985).

[27] Riggs, *supra*, 26 Ariz. L. Rev. at 270.

[28] *See Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970); *Miller v. California*, 413 U.S. at 36 n.17; *Ginsberg v. New York*, 390 U.S. at 636-641; *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964) (opinion of Brennan, J.). *See also Ferber v. New York, supra* (upholding state authority to regulate child pornography not legally obscene under *Miller*).

The Cable Television Programming Decency Act rests squarely upon the above authority. In its legislative intent statement, the Utah legislature expressly found that "unconsenting adults may, without warning, tune into a cable television program where offensive language or depictions are being transmitted." App. G at 99a. It also noted that "children have access to cable television and, in many cases, are unsupervised by parents." *Ibid.* It further found that offensive materials were entering the home, "a place where the individual's privacy interest is afforded and entitled to extra deference." *Ibid.* The legislature accordingly drafted a careful regulatory measure to minimize offense to children and unconsenting adults while protecting the "rights of free speech guaranteed by the First Amendment." *Ibid.*

That regulatory measure, the Cable Television Programming Decency Act, does not reflexively ban indecent speech. Rather, the Act regulates indecency "by principles analogous to those found in the law of nuisance where the 'law generally speaks to *channeling* behavior more than * * * prohibiting it.'" *Pacifica*, 438 U.S. at 731 (quoting 56 F.C.C.2d at 98) (emphasis in original). The statute provides for a civil fine [29] to be levied against cablecasters who, as a continuing course of conduct,[30] distribute specifically defined sexual materials in such a "time, place, manner and context" as to be "patently offensive." [31] The import and operative effect of the Act is plain: graphic presentations of the specifically described sexual activities covered by the Act must be presented in a "time, place, manner and context" such that they are not "patently offensive." [32] And, such materials will be less likely to be "patently offensive" when the possibility

---

[29] Utah Code Ann. § 76-10-1704.

[30] Utah Code Ann. § 76-10-1703.

[31] Utah Code Ann. § 76-10-1702.

[32] *Ibid.*

that unconsenting adults or unsupervised children are in the audience has been minimized. *Pacifica*, 438 U.S. at 748-750; *Id.* at 758-761 (Powell, J., concurring); App. H at 110a-113a.

The permissibility of such a limited, channeling regulation is plainly indicated by *Pacifica*. Indeed, the lower courts' invalidation of the Act necessarily rests upon their rejection of the legislative conclusion that *Pacifica* permits limited regulation of indecent, but not obscene, material that enters the home on cable television. The courts below first found that the rationale of *Pacifica* does not extend to cable television. They then concluded that, whatever that decision's reach, a statute based on language drawn from *Pacifica* is unconstitutionally vague.

The lower courts' refusal to apply *Pacifica* to the Act requires review by this Court. The effect of those courts' opinions is to pronounce *Pacifica* moribund—if not dead. This Court, not the district court or the court of appeals, should determine the vitality of such an important constitutional precedent, particularly in light of its effect on state legislative authority.

A. The Rationale of *Pacifica* Is Applicable To The Utah Act

The district court held that the Act was not within the "narrow" factual limits of *Pacifica* because that case did not authorize regulation "at all times of day" and the Utah statute imposes a fine for the cablecast of covered materials "at *any* time." App. B at 63a (emphasis in original). This analysis miscomprehends *Pacifica* as well as the Utah statute.

The precise question before the Court in *Pacifica* was whether a federal statute, which creates the possibility of a fine or imprisonment for anyone who "utters any * * * indecent * * * language by means of radio com-

munications," [33] permitted the FCC to sanction a broadcaster which aired comedian George Carlin's "Filthy Words" monologue at 2 p.m. in the afternoon. 438 U.S. at 729-730. The Court simply held that application of the statute to the Pacifica Foundation was not unconstitutional because the FCC, in its decision, had considered a "host of variables," including the "content of the program" and the "time of day" it was broadcast. 438 U.S. at 750.[34] The decision does not suggest that, to withstand constitutional scrutiny, a statute regulating indecency must specifically set out limited hours of operation. Indeed, the statute involved in *Pacifica*, on its face, punished the dissemination of indecency "at *any* time." App. B at 63a (emphasis in original). Thus, the district court's apparent assumption that *Pacifica* requires indecency statutes to contain an express temporal limitation is unfounded.

Furthermore, even if *Pacifica* had imposed such a standard, it is met by the Utah Act. The legislative intent statement, the legislative debates, and the Attorney General's auhoritative interpretation of the Act all make clear that the purpose of the statute is to channel indecent material to the " 'times of the day when there is [no] reasonable risk that children may be in the audience.' " *Pacifica*, 438 U.S. at 732 (quoting 56 F.C.C.2d at 98). In the face of this evidence, the lower courts' refusal to accord the Act some scope as permissible regulation under *Pacifica* was highly improper.

The district court concluded that *Pacifica*'s rationale has been substantially limited by subsequent cases, and has never been applied to "any medium other than broad-

---

[33] 18 U.S.C. § 1464 (1982).

[34] *See also* 438 U.S. at 760 (Powell, J., concurring) (FCC order does not prevent Pacifica Foundation "from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience").

cast." App. B at 65a. This conclusion is wrong. The only authority cited in support of it was *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). And *Bolger*, while distinguishing *Pacifica*, did not modify it. Unlike *Pacifica*, *Bolger* involved an outright ban on the dissemination of printed material discussing important public issues. Like *Pacifica*, the instant case involves an Act which does not prohibit indecency but instead channels indecent presentations to those hours when unwilling adults and minors are unlikely to be in the audience. The lower courts to the contrary, the permissibility of such a regulatory rationale has been upheld repeatedly by this Court outside *Pacifica*'s broadcasting context.[35]

The district court next held that *Pacifica* does not apply to the Act because cablecasting is an "invitee" rather than a broadcast "intruder." App. B at 71a. This dismissal of *Pacifica* is surely suspect. *Pacifica* is founded upon the broadcast media's "uniquely pervasive presence in the lives of all Americans" (438 U.S. at 748), a trait shared by cable television.[36] The "intruder-invitee" anal-

---

[35] *See, e.g., Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159 (1986) (upholding authority of state to discipline student for indecent speech made during student body elections); *City of Renton v. Playtime Theatres*, 106 S.Ct. 925 (1986) (upholding zoning regulation of the locations from which non-obscene materials could be distributed); *New York v. Ferber, supra* (upholding constitutionality of state efforts to control the production and distribution of child pornography not meeting the *Miller* test for obscenity); *Board of Education v. Pico*, 457 U.S. 853 (1982) (books may constitutionally be removed from a high school library because of their vulgarity but not because of their objectionable ideas); *Young v. American Mini-Theatres*, 427 U.S. 50 (1976) (upholding zoning regulation of the locations from which non-obscene materials could be distributed); *Ginsberg v. New York, supra* (sustaining law protecting children from exposure to non-obscene material).

[36] *See, e.g.* App. A at 34a (Baldock, J., concurring) ("[j]ust as radio and television are pervasive, so too is cable television with over 34 million, or approximately 40 percent of, television households subscribing").

ysis, furthermore, ignores the reality that broadcasting too is an "invitee"—no one receives broadcast signals without first purchasing a receiver and then turning it on.[37]

The district court finally held that the governmental interest in protecting children, one of the principal grounds supporting the regulation in *Pacifica*, did not sustain the Utah Act because, "[a]lthough protecting children is a very desirable and legitimate goal, the Act itself does not mention children anywhere." App. B at 72a. The district court's disregard, on this ground, of the State's interest in safeguarding its youth is patent error.

The legislative intent statement expressly reflects the legislature's concern regarding "the accessibility of [cable television] to children." App. G at 99a. Indeed, a fundamental legislative concern animating the Act was children's unsupervised access to the medium. *Ibid.* In Utah, as elsewhere, plain statements of legislative intent are properly utilized in construing legislation. *See Christensen v. Industrial Commission*, 642 P.2d 755, 756 (Utah 1982); *Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980).[38] The First Amendment does not require

---

[37] When a family subscribes to family format cable (as distinguished from, for example, the Playboy Channel), what it obtains is a variety of programs from which to choose. A family should not thereby be deemed to have invited into the home, at any time, any piece of patent offensiveness with which a cablecaster may choose to surprise it. That the listeners in *Pacifica* had obtained a radio and turned it on was not cited by any Justice as an indication that they had invited the indecent monologue that followed.

[38] *See also* Office of Legislative Research and General Counsel, *Bill Drafting Manual for the State of Utah* 15 (Utah 1985) ("the drafter may have a statement of purpose read into the journal of each house as part of the official record of the legislature, rather than including it as part of the bill. The Utah Supreme Court has held that, in construing legislation, it is the court's primary responsibility to give effect to the intent of the legislature. * * * An intent

a federal court to disregard a State's interest in the "well-being of its youth" (*Ginsberg v. New York*, 390 U.S. at 640)[39] unless the very word "children" is included in the language of a statute. Indeed, the statute construed in *Pacifica* did not refer to children.

The Utah legislature has specifically found that cable television is a "pervasive and widely available influence in the community, particularly the home" (App. G at 99a), and has acted to channel patently offensive sexual material away from children and unwilling adult viewers. The Constitution does not prohibit the State from acting to protect these privacy interests in the home, "where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica*, 438 U.S. at 748 (citing *Rowan v. Post Office Dept., supra*).

B. The Act Is Not Unconstitutionally Vague

The courts below concluded that the Act is "void for vagueness" because its "time, place, manner, and context" test for "patent offensiveness" provides "neither fair notice or warning nor reasonably clear guidelines." App. B at 78a; App. A at 5a. This conclusion, in light of *Pacifica*, is highly ironic. There, the very basis for *upholding* the FCC's regulation of indecent speech was that the regulation "rested on a nuisance rationale" which required "consideration of a host of variables," including "time of day," "content of the program," "composition of the audience," and "context." 438 U.S. at 750. Apparently, the courts below have concluded that, even if *Pacifica* is applicable to the Act, the legislation nevertheless fails because the constitutional standard adopted in that case is unconstitutionally vague.

---

statement, either in the bill or in the journal, may help the court or the implementing body clarify an otherwise ambiguous bill").

[39] *See also Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944).

The lower courts' reasoning is erroneous. The flexibility inherent in the Utah Act is sensible in light of First Amendment considerations and indeed is required by *Pacifica*. It creates no more vagueness than the typical obscenity statute, which must incorporate an analogous wide-ranging inquiry into contemporary community standards. *Miller v. California*, 413 U.S. at 24. Moreover, this Court has found it proper to uphold legislation where "[b]oth the text and the background of the [state] statute indicate that the state legislature sought to conform" its law to the constitutional standards outlined in the opinions of the Court. *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. at 2805 (O'Connor, J., concurring). The Utah Act and its background reflect a conscientious effort to conform to the standards set by this Court.

Any difficulties or ambiguities inherent in the Utah Act's precise wording are neither the fault of this Court nor the fault of the Utah legislature. They are intrinsic to the human condition.[40] The Utah Act, in its tracking of the language and doctrine developed by this Court, is not void for vagueness.

---

[40] *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952) ("[F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line"); J. Madison, *The Federalist*, No. 37 at 229 (New American Library 1961) ("All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications").

II. The Lower Courts Erred In Striking Down The Act On Its Face Notwithstanding That It Rests Upon A Nuisance Rationale Under Which Context Is All-Important And Has Never Been Enforced In a Concrete Factual Situation

The fundamental error of the trial and appellate courts is that they have held that the State has no constitutional authority to regulate any indecent material that is not obscene. That error is compounded here by the fact that they have held an important state statute unconstitutional in its entirety based solely on speculation as to how the statute might be applied. The courts below improperly held the statute invalid as an outright ban on constitutionally protected speech despite the contrary guidance provided by the legislature's official intent statement, a narrow interpretation of the statute given by the State Attorney General, and the plainly constitutional construction of the statute suggested by *Pacifica*. In doing so, they have adopted an interpretation of the statute which favors invalidity rather than validity.

The courts below have acted directly contrary to numerous decisions of this Court requiring that constitutional decisions be based upon concrete controversies and real fact, rather than upon speculation, assumption and hypothesis.[41] The Cable Television Programming Decency Act regulates the cablecasting of patently offensive sexual material "entirely on a nuisance rationale under which context is all-important." *Pacifica*, 438 U.S. at 750. The statute "requires consideration of a host of variables"

---

[41] *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969) ("we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable * * *, but will deal with those problems as they arise"); *United States v. Sullivan*, 332 U.S. 689, 694 (1948) ("The scope of the offense which Congress defined is not to be judicially narrowed * * * by envisioning extreme possible applications of its different * * * provisions * * *. There will be opportunity enough to consider such contingencies should they ever arise").

and therefore "cannot be adequately judged in the abstract." *Ibid.*; *id.* at 742 (opinion of Stevens, J.). Despite the obvious importance of a factual record in such circumstances, the lower courts proceeded with a facial invalidation of the Act prior to any enforcement action. The decisions below tear the Act from any consideration of context and deprive the judiciary of the opportunity to analyze the statute in a concrete setting. This alone was error, but there is more.

Not only did the lower court opinions proceed upon simple assumption, they also ignored the only evidence that would have reduced the level of hypothesis in the case to manageable proportions. The decisions disregard the legislative intent statement and the legislative debates, which make clear that the Act "speaks to *channeling* behavior more than actually prohibiting it." *Pacifica*, 438 U.S. at 731 (quoting 56 F.C.C.2d at 98) (emphasis in original). The district court refused to consider as well the actual examples of materials that would prompt enforcement of the Act. Finally, the lower courts disregarded the limiting construction given the Act by the State's highest legal officer. This was plain error.[42]

The course adopted below also impinges upon the proper allocation of state and federal authority and the sound administration of justice. The unwisdom of deciding cases in the abstract has both constitutional[43] and

---

[42] *Ferber v. New York*, 458 U.S. at 764 (legislation to be read "as written or authoritatively construed"); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered"); *Broadrick v. Oklahoma*, 413 U.S. 600, 617-618 (1973) ("Surely a court cannot be expected to ignore these authoritative pronouncements [of the state attorney general] in determining the breadth of a statute"). *See also Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

[43] *See, International Longshoremen's and Warehousemen's Union Local 37 v. Boyd*, 347 U.S. 222, 224 (1954) ("Determination of the

prudential underpinnings. The underlying premise of the abstention cases, for example, is that federal courts should not hold state statutes unconstitutional based on speculation concerning their *possible* applications if better information can be obtained concerning their *actual* reach.[44] Similarly, the thrust of such recent holdings as *New York v. Ferber*, *supra*, and *Brockett v. Spokane Arcades, Inc.*, *supra*, is that plaintiffs who challenge state statutes must do so based on how the statute is actually applied to them—not to how it might or might not be applied to someone else.

The plaintiffs and the lower courts proceeded upon the assumption that they did not need to concern themselves with facts, context, legislative intent, and possible limiting constructions because the Act was "overbroad" and " 'does not aim specifically at evils within the allowable areas of [government] control, but * * * sweeps within its ambit other activities that constitute an exercise of protected expressive * * * rights.' " App. B at 54a-55a (quoting L. Tribe, *Constitutional Law*, § 12-24 at 710 (1978)). But, while "the First Amendment needs breathing space" (*Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973)), the overbreadth doctrine does not permit federal courts to "survey the statute books and pass judg-

---

scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function"). *See also Kleppe v. New Mexico*, 426 U.S. 529 (1976); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945); *Muskrat v. United States*, 219 U.S. 346 (1910).

[44] *See Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. at 2804-05 (1985) (O'Connor, J., concurring) (state obscenity statute concerns important state issues, and federal courts should abstain from entertaining a facial attack if the statute is fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question).

ment on laws before the courts are called upon to enforce them." *Younger v. Harris*, 401 U.S. 50, 52 (1971).[45] The doctrine is " 'strong medicine' and [is] employed * * * with hesitation, and then only as a last resort." *New York v. Ferber*, 458 U.S. at 769 (quoting *Broadrick v. Oklahoma*, 413 U.S. at 613).

Moreover, the overbreadth doctrine simply does not apply unless the "overbreadth is incurable and would taint all possible applications of the statute." *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. at 2802. As shown in Part I above, there is a substantial area within which the State of Utah may legitimately regulate the dissemination of indecent cablecast material. Therefore, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. at 616; *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. at 2802.

Both in their constitutional and their prudential dimensions, the above principles govern this case. There is serious question whether a facial challenge to the Act is a ripe case or controversy within the power of Article III courts to decide. This suit was filed the day after enactment of the statute. The Act has never been enforced. The plaintiffs and the lower courts have proceeded on the basis of assumption as to the kinds of materials it would prohibit, and the hours of the day they would be prohibited. Finally, even if the courts below had the constitutional power facially to invalidate the Act in such an unfocused posture, they clearly should not have done so.

In its current setting, there is only one issue in this case that federal courts have the unclouded power to decide. In *Pacifica*, this Court held that indecent material conveyed by a pervasive medium possessing the po-

---

[45] *See also Watson v. Buck*, 313 U.S. 387, 395-401 (1941).

tential for adverse impact on children and unconsenting adults in the home can be channeled notwithstanding the fact that it is not obscene. The narrow question—indeed, the only question—which can and should be decided at this time is whether, under *Pacifica*, the State of Utah has *any* constitutional authority to channel the cablecasting of indecent material so as to minimize its imposition on children and unwilling adult viewers. As shown in Part I above, that question should be resolved in favor of the State.

III. 42 U.S.C. § 1988 Does Not Authorize The Award Of Attorneys' Fees To Wealthy Corporate Litigants Who, Absent The Fee Provision, Would Nevertheless Have Pressed Their Claims

The lower courts improperly awarded costs and attorneys' fees to the cable company plaintiffs pursuant to 42 U.S.C. § 1988 (1982).[46] The award of such fees to billion-dollar corporations who would have litigated their position even without the statute is contrary to congressional intent and conflicts with decisions of the United States Court of Appeals for the Second Circuit. *Zarcone v. Perry*, 581 F.2d 1039, 1044 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *Wheatley v. Ford*, 679 F.2d 1037, 1040 (2d Cir. 1982).

The Senate and House Reports on the bills proposing § 1988, as well as the floor remarks of the legislators who spoke in favor of the bills, repeatedly identified the bills' central purpose to be the elimination of the financial hurdle that discourages a person with "little or no money" from hiring a lawyer. S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976); 121 Cong. Rec. 26806 (1975) (remarks of Sen. Tunney). *See also* H.R. Rep. No. 1558,

---

[46] Should this Court agree with appellant that the lower courts erred in invalidating the Utah Act, it need not reach the propriety of the fee award to wealthy corporate litigants because the cable company plaintiffs would no longer be prevailing parties.

94th Cong., 2d Sess. 1, 3, 4 (1976); 122 Cong. Rec. 31471, 35118, 35126, 35128, 35127 (1976) (remarks of Sen. Mathias, Rep. Seiberling, Rep. Fish, Rep. Holtzman and Rep. Jordan). These materials make clear that the statute simply does not apply to wealthy litigants who would press their position without regard to the prospect of recovering their costs.

The appellant submitted substantial evidence to the trial court establishing that the cable companies are not in the category of those who have "little or no money." [47] It was undisputed below that, in 1984, Time, Inc., owner of Home Box Office, Inc., had assets of over $2.6 billion and that TCI, the owner of the other four cable company plaintiffs, had assets of over $1.5 billion. The trial court noted that there is no question but that the cable company plaintiffs' assets are substantial. App. C at 82a.

The cable company plaintiffs, moreover, would have brought this suit even without the prospect of a fee award. HBO's affluence, for example, has enabled it to take part in a substantial amount of similar litigation across the nation, including *HBO v. Wilkinson*, *supra*, and *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985). In *HBO v. Wilkinson*, the district court awarded no fees to HBO or the other cable plaintiffs, although fees were sought. The past failure to recover fees did not deter HBO from bringing this suit. Fees here would be a windfall, totally beyond the purview of the congressional intent underlying § 1988.

The lower courts' action in awarding fees to the cable company plaintiffs despite their wealth also conflicts with decisions of the Second Circuit. That court, in *Zarcone v. Perry*, 581 F.2d at 1044, stated that

> the Supreme Court has made it clear that in determining whether attorneys' fees should be awarded to

[47] *See* Exhibits and Affidavits attached to the Defendant's Opposition to Plaintiffs' Motion for Fees, Rec. 765-776.

> a prevailing civil rights plaintiff, the principal factor to be considered by the trial judge in exercising his discretion is whether a person in the plaintiff's position would have been deterred or inhibited from seeking to enforce civil rights without an assurance that his attorney's fees would be paid if he were successful.

The rule has been reinforced in *Wheatley v. Ford*, 679 F.2d at 1040, where the Second Circuit concluded that the inquiry preceding the award of fees under § 1988 should be "whether a plaintiff in a similar situation would be deterred from bringing the action absent the likelihood of a fee award." [48]

Under the facts of this case, the Second Circuit almost certainly would have denied fees to the cable company plaintiffs. The difference between the Second Circuit and the courts below on this issue is that the Second Circuit has followed congressional intent in applying § 1988, while the courts below have not.

Finally, beyond the fact that the award of attorneys' fees to the cable company plaintiffs ignores congressional intent and conflicts with other precedent, it is simply unjust to impose the burden of such fees on the citizens of the State of Utah. The State, in express reliance on decisions of this Court which establish the constitutionality of careful efforts to channel indecent materials away from susceptible children and unwilling adults, enacted the Cable Television Programming Decency Act. Before the State had the opportunity to establish the sphere

---

[48] Although the court of appeals categorized *Zarcone* and *Wheatley* as establishing a "'bright prospects' rule" (App. A at 5a n.3), appellant does not rely on a narrow "bright prospects" rationale. The "bright prospects" rule, which inquires whether there is a "likelihood of success * * * sufficient to attract competent counsel on a contingent fee basis" (*ibid.*), was developed by the Second Circuit subsequent to its decision in *Zarcone* and is narrower than the rule announced there, upon which appellant relies.

within which the Act would operate, the cable company plaintiffs brought suit claiming that there was no legitimate scope whatsoever to the Act. All the State has done in this litigation is to defend, in good faith, a legislative decision that—unless this Court confines *Pacifica* to its precise facts—is certainly not unconstitutional in all of its possible applications. This Court should not permit the lower courts to construe 42 U.S.C. § 1988 so as to require the taxpayers of a State to reimburse wealthy business interests their attorneys' fees any time they successfully challenge regulatory actions that have been patterned after this Court's decisions.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

REX E. LEE *
Special Assistant
Attorney General
for the State of Utah
SIDLEY & AUSTIN

RALPH L. FINLAYSON
Assistant Attorney General
for the State of Utah

RICHARD G. WILKINS
Special Assistant
Attorney General
for the State of Utah

CHARLES A. HOBBS
THEODORE A. SHIELDS
Special Assistant
Attorneys General
for the State of Utah
HOBBS, STRAUS,
DEAN & WILDER
Counsel for Appellant

* Counsel of Record

January 6, 1987

CERTIFICATE OF SERVICE

Served this 6th day of January, 1987, by mailing three copies of the Jurisdictional Statement and Appendix, postage prepaid, to the following, which includes all parties required to be served.

Bryan L. McDougal
Attorneys for Plaintiff
Community Television of Utah
Suite 735 Judge Building
Salt Lake City, Utah 84111

Patricia A. O'Rorke
Steven H. Blum
Attorneys for Plaintiffs
Connie R. Jones, et al.
500 Kearns Building
Salt Lake City, Utah 84101

George H. Shapiro
James P. Mercurio
Gerald E. Oberst, Jr.
Attorneys for Plaintiff
Home Box Office, Inc.
Washington Square
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Faith Wender
Of Counsel for Plaintiff
Home Box Office, Inc.
2049 Century Park East
Los Angeles, California 90067

Donald B. Holbrook
LeGrand R. Curtis
Attorneys for Plaintiff
Home Box Office, Inc.
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101

Lloyd C. Eldredge
Attorney at Law
3760 Highland Drive, #500
Salt Lake City, Utah 84106

David M. Hunsaker
Attorney at Law
P.O. Box 529
McLean, Virginia 22101

Seth A. Davidson
Brenda L. Fox
Attorneys at Law
Massachusetts Avenue, N.W.
Washington, D.C. 20036